

Calendar No. 434

110TH CONGRESS
1ST SESSION

S. 2035

To maintain the free flow of information to the public by providing conditions for the federally compelled disclosure of information by certain persons connected with the news media.

IN THE SENATE OF THE UNITED STATES

SEPTEMBER 10, 2007

Mr. SPECTER (for himself, Mr. LUGAR, Mr. SCHUMER, Mr. GRAHAM, Mr. DODD, and Mr. LEAHY) introduced the following bill; which was read twice and referred to the Committee on the Judiciary

OCTOBER 22, 2007

Reported by Mr. LEAHY, with amendments

[Omit the part struck through and insert the part printed in *italic*]

A BILL

To maintain the free flow of information to the public by providing conditions for the federally compelled disclosure of information by certain persons connected with the news media.

1 *Be it enacted by the Senate and House of Representa-*
2 *tives of the United States of America in Congress assembled,*

1 **SECTION 1. SHORT TITLE.**

2 This Act may be cited as the “Free Flow of Informa-
3 tion Act of 2007”.

4 **SEC. 2. COMPELLED DISCLOSURE FROM COVERED PER-**
5 **SONS.**

6 (a) CONDITIONS FOR COMPELLED DISCLOSURE.—In
7 any proceeding or in connection with any issue arising
8 under Federal law, a Federal entity may not compel a cov-
9 ered person to provide testimony, or produce any docu-
10 ment, relating to protected information, unless a Federal
11 court determines by a preponderance of the evidence, after
12 providing notice and an opportunity to be heard to such
13 covered person—

14 (1) that the party seeking to compel production
15 of such testimony or document has exhausted all
16 reasonable alternative sources (other than a covered
17 person) of the testimony or document;

18 (2) that—

19 (A) in a criminal investigation or prosecu-
20 tion, based on information obtained from a ~~per-~~
21 ~~son~~ *source* other than the covered person—

22 (i) there are reasonable grounds to be-
23 lieve that a crime has occurred;

24 (ii) the testimony or document sought
25 is essential to the investigation or prosecu-

1 tion or to the defense against the prosecu-
2 tion; and

3 (iii) in a criminal investigation or
4 prosecution of an unauthorized disclosure
5 of properly classified information by a per-
6 son with authorized access to such infor-
7 mation, such unauthorized disclosure has
8 caused *or will cause* significant, ~~clear~~, and
9 articulable harm to the national security;
10 or

11 (B) in a matter other than a criminal in-
12 vestigation or prosecution, based on information
13 obtained from a ~~person~~ *source* other than the
14 covered person, the testimony or document
15 sought is essential to the resolution of the mat-
16 ter; and

17 (3) that nondisclosure of the information would
18 be contrary to the public interest, taking into ac-
19 count both the public interest in compelling disclo-
20 sure and the public interest in gathering news and
21 maintaining the free flow of information.

22 (b) LIMITATIONS ON CONTENT OF INFORMATION.—
23 The content of any testimony or document that is com-
24 pelled under subsection (a) shall, to the extent possible—

1 (1) be limited to the purpose of verifying pub-
 2 lished information or describing any surrounding cir-
 3 cumstances relevant to the accuracy of such pub-
 4 lished information; and

5 (2) be narrowly tailored in subject matter and
 6 period of time covered so as to avoid compelling pro-
 7 duction of peripheral, nonessential, or speculative in-
 8 formation.

9 **SEC. 3. EXCEPTION RELATING TO CRIMINAL OR TORTIOUS**
 10 **CONDUCT.**

11 (a) IN GENERAL.—Section 2 shall not apply to any
 12 information, record, document, or item obtained as the re-
 13 sult of the eyewitness observations of *alleged* criminal con-
 14 duct or commitment of *alleged* criminal or tortious conduct
 15 by the covered person, including any physical evidence or
 16 visual or audio recording of the observed conduct. ; if a
 17 Federal court determines that the party seeking to compel
 18 disclosure under this section has exhausted reasonable ef-
 19 forts to obtain the information from alternative sources.

20 (b) EXCEPTION.—This section shall not apply, *and*
 21 *section 2 shall apply*, if the alleged criminal or tortious
 22 conduct is the act of communicating the documents or in-
 23 formation at issue.

1 **SEC. 4. EXCEPTION TO PREVENT DEATH, KIDNAPPING, OR**
 2 **SUBSTANTIAL BODILY INJURY.**

3 Section 2 shall not apply to any protected information
 4 that is reasonably necessary to stop, prevent, or mitigate
 5 a specific case of—

- 6 (1) death;
- 7 (2) kidnapping; or
- 8 (3) substantial bodily harm.

9 **SEC. 5. EXCEPTION TO PREVENT TERRORIST ACTIVITY OR**
 10 **HARM TO THE NATIONAL SECURITY.**

11 Section 2 shall not apply to any protected information
 12 that a Federal court has found by a preponderance of the
 13 evidence would assist in preventing a specific case of—

- 14 (1) ~~terrorism against the United States an act~~
 15 *of terrorism*; or
- 16 (2) ~~significant harm other significant and~~
 17 *articulable harm* to national security that would out-
 18 weigh the public interest in newsgathering and
 19 maintaining a free flow of information to citizens.

20 **SEC. 6. COMPELLED DISCLOSURE FROM COMMUNICATIONS**
 21 **SERVICE PROVIDERS.**

22 (a) **CONDITIONS FOR COMPELLED DISCLOSURE.—**
 23 ~~With respect to testimony or any document consisting of~~
 24 ~~any record, information, or other communication that re-~~
 25 ~~lates to a business transaction between a communications~~
 26 ~~service provider and a covered person, section 2 shall apply~~

1 *With respect to testimony that relates to a communication*
 2 *to which a covered person is a party or any document that*
 3 *consists of any record or other information relating to a*
 4 *communication to which a covered person is a party, or*
 5 *that contains the contents of a communication to which a*
 6 *covered person is a party, section 2 shall apply to such*
 7 *testimony or document if sought from the a communica-*
 8 *tions service provider in the same manner that such sec-*
 9 *tion applies to any testimony or document sought from*
 10 *a covered person.*

11 (b) NOTICE AND OPPORTUNITY PROVIDED TO COV-
 12 ERED PERSONS.—A Federal court may compel the testi-
 13 mony or disclosure of a document ~~under~~ *described in this*
 14 *section only after the party seeking such a such testimony*
 15 *or document provides the covered person who is a party*
 16 *to the business transaction communication described in*
 17 *subsection (a)—*

18 (1) notice of the subpoena or other compulsory
 19 request for such testimony or disclosure from the
 20 communications service provider not later than the
 21 time at which such subpoena or request is issued to
 22 the communications service provider; and
 23 (2) an opportunity to be heard before the court
 24 before compelling testimony or the disclosure of a
 25 document.

(c) EXCEPTION TO NOTICE REQUIREMENT.—Notice under subsection (b)(1) may be delayed for not more than 45 days if the court involved determines by clear and convincing evidence that such notice would pose a substantial threat to the integrity of a criminal investigation. This period may be extended by the court for an additional period of not more than 45 days each time the court makes such a determination.

SEC. 7. SOURCES AND WORK PRODUCT PRODUCED WITHOUT PROMISE OR AGREEMENT OF CONFIDENTIALITY.

Nothing in this Act shall supersede, dilute, or preclude any law or court decision compelling or not compelling disclosure by a covered person or communications service provider of—

(1) information identifying a source who provided information without a promise or agreement of confidentiality made by the covered person as part of engaging in journalism; or

(2) records, ~~communication data, documents, or information~~ *other information, or contents of a communication* obtained without a promise or agreement that such records, ~~communication data, documents, or information~~ *other information, or contents of a communication* would be confidential.

1 **SEC. 8. DEFINITIONS.**

2 In this Act:

3 (1) COMMUNICATIONS SERVICE PROVIDER.—

4 The term “communications service provider”—

5 (A) means any person that transmits infor-
6 mation of the customer’s choosing by electronic
7 means; and

8 (B) includes a telecommunications carrier,
9 an information service provider, an interactive
10 computer service provider, and an information
11 content provider (as such terms are defined in
12 section 3 or 230 of the Communications Act of
13 1934 (47 U.S.C. 153 and 230)).

14 ~~(2) COVERED PERSON.—The term “covered~~
15 ~~person” means a person who is engaged in jour-~~
16 ~~nalism and includes a supervisor, employer, parent,~~
17 ~~subsidiary, or affiliate of such person.~~

18 (2) *COVERED PERSON.—The term “covered per-*
19 *son”—*

20 (A) *means a person who is engaged in jour-*
21 *nalism;*

22 (B) *includes a supervisor, employer, parent*
23 *company, subsidiary, or affiliate of a person de-*
24 *scribed in subparagraph (A); and*

25 (C) *does not include any person who is—*

(i) a foreign power or an agent of a foreign power, as those terms are defined in section 101 of the Foreign Intelligence Surveillance Act of 1978 (50 U.S.C. 1801);

(ii) a foreign terrorist organization designated under section 219(a) of the Immigration and Nationality Act (8 U.S.C. 1189(a));

(iii) designated as a Specially Designated Global Terrorist by the Department of the Treasury under Executive Order Number 13224 (50 U.S.C. 1701);

(iv) a specially designated terrorist, as that term is defined in section 595.311 of title 31, Code of Federal Regulations (or any successor thereto); or

(v) a terrorist organization, as that term is defined in section 212(a)(3)(B)(vi)(II) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(3)(B)(vi)(II)).

(3) DOCUMENT.—The term “document” means writings, recordings, and photographs, as those terms are defined by rule 1001 of the Federal Rules of Evidence (28 U.S.C. App.).

1 (4) FEDERAL ENTITY.—The term “Federal en-
 2 tity” means an entity or employee of the judicial or
 3 executive branch or an administrative agency of the
 4 Federal Government with the power to issue a sub-
 5 poena or issue other compulsory process.

6 (5) JOURNALISM.—The term “journalism”
 7 means the regular gathering, preparing, collecting,
 8 photographing, recording, writing, editing, reporting,
 9 or publishing of news or information that concerns
 10 local, national, or international events or other mat-
 11 ters of public interest for dissemination to the pub-
 12 lic.

13 (6) PROTECTED INFORMATION.—The term
 14 “protected information” means—

15 (A) information identifying a source who
 16 provided information under a promise or agree-
 17 ment of confidentiality made by a covered per-
 18 son as part of engaging in journalism; or

19 (B) any records, ~~communications data con-~~
 20 tents of a communication, documents, or infor-
 21 mation that a covered person obtained or cre-
 22 ated—

23 (i) as part of engaging in journalism;
 24 and

- 1 (ii) upon a promise or agreement that
2 such records, ~~communication data~~ *contents*
3 *of a communication*, documents, or infor-
4 mation would be confidential.

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